The Human Rights Code, R.S.O. 1990, C.H. 19

In The Matter of the Complaint of Terry Bolton dated September 23, 1988, against Cancoil Thermal Corporation and Chander Datta.

Before: Deborah J. Leighton
A Board of Inquiry

Appearances: Anthony Griffin, for the Ontario Human Rights Commission;

The Complainant in person;

Chander Datta in person and for Cancoil Thermal Corporation.

On March 19, 1993, pursuant to subsection 38 (1) of the Human Rights Code R.S.O. 1990, c. H. 19 (the Code),[1] I was appointed by the Minister of Citizenship as the Board of Inquiry to hear and decide a complaint of Terry Bolton, dated September 23, 1988, alleging discrimination in employment on the basis of handicap by Cancoil Thermal Corporation (Cancoil) and Chander Datta, owner and manager of Cancoil, contrary to sections 5 (1) and 9 of the Code.

Mr. Bolton was born with a shorter left arm that is also weaker than his right. His left hand is smaller than his right, and has four digits. It is not disputed by the Respondents that the Complainant has a physical disability.

At the hearing into this matter, the Complainant gave evidence that he was interviewed for a job with Cancoil by Mr. Mike Ryan, a foreman of the company on September 13, 1988. Mr. Ryan hired Mr. Bolton as a general labourer to start work with the company on September 19, 1988.

Mr. Bolton reported for work on September 19, 1988 and worked for about an hour when Mr. Datta approached Mr. Bolton, stated that he had some concerns related to safety and Mr. Bolton's "reliability". Mr. Datta sent Mr. Bolton home, saying that he had to make some inquiries and that he would have a further meeting with Mr. Bolton in a few days.

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[1] Throughout this decision all references to the Code will refer to the Revised Statutes of Ontario 1990: except as to numbering there has been no change in the Code relevant to this case.

Mr. Bolton was to work as a coil tester. His job was to ensure that coils had no leaks. He had to lift the small coil, put it into a tank of water while high pressured air was being pumped into the coil. He had to observe whether there were any bubbles which would indicate a leak. So the job involved picking up the coil, putting it into the tank, inspecting it for leaks, and then removing it from the tank, and drying it off.

After Mr. Datta asked Mr. Bolton to leave the company, it was Mr. Datta's evidence that he made inquiries to the Ministry of Labour and the Workers' Compensation Board (WCB). Mr. Datta stated in evidence that he did not feel that he got satisfactory assurances from the Ministry of Labour or the WCB regarding his safety concerns. Mr. Datta met again with the Complainant on September 21, 1988. It was Mr. Datta's own evidence, that in his opinion Mr. Bolton would not be able to safely carry out a variety of production activities existing at Cancoil, including those for which Mr. Ryan had hired the Complainant. And he told this to Mr. Bolton at the meeting on September 21, 1988. According to Mr. Bolton, Mr. Datta made no reference to having Mr. Bolton assessed or to continuation of employment. Mr. Bolton's evidence was that he was very upset with the news and his conclusion at the end of the September 21, 1988 meeting was that he had been fired.

At the hearing into this matter there was a dispute as to whether Mr. Bolton had been fired. The Respondents gave evidence that Mr. Bolton's status as an employee was "on hold" pending

further inquiries. However the Respondents did not provide any evidence of plans or steps taken to assess Mr. Bolton. Given Mr. Datta's opinion that Mr. Bolton was unable to work at any job at Cancoil, it was reasonable for Mr. Bolton to conclude that he had been fired. Therefore I find that Mr. Bolton's employment was terminated on September 21, 1988.

From Mr. Datta's own evidence and that of Mr. Parkinson, an employee of Cancoil, it is clear that Mr. Bolton 's physical disability was the factor in making the decision to terminate Mr. Bolton's employment. This evidence is sufficient to prove a *prima facie* case of breach of Section 5(1) and 9 of the Code which provide:

> S 5(1) Every person has a right to equal treatment with respect to employment without discrimination because of race, ancestry, place or origin, citizenship, creed, sex, sexual orientation, age, record of offenses, marital status, family status or handicap. (emphasis added)
>
> S. 9 No person shall infringe or do, directly or indirectly, anything that infringes a right under this Part.

Mr. Bolton's right to equal treatment with respect to employment was breached when the Respondents made a decision that Mr. Bolton was unable to the job at Cancoil because of his handicap.

Once a *prima facie* case has been made out, it is up to the Respondents to prove a defense pursuant to Section 17. Section 17 provides:

> (1) A right of a person under this Act is not infringed for the reason only that the person is incapable of performing or fulfilling the essential duties or requirements attending the exercise of the right because of

handicap.

> (2) ...a board of inquiry or a court shall not find a person incapable unless it is satisfied that the needs of the person cannot be accommodated without undue hardship on the person responsible for accommodating those needs, considering the cost, outside sources of funding, if any, and health and safety requirements, if any.

In anticipation of this defense Commission Counsel put in evidence that Mr. Bolton was capable of doing the job. The Board heard evidence from two experts, Ms. Lucy Stewart, an Occupational Therapist, and Ms. Sandra Vellone, the Senior Vocational Rehabilitation Counsellor at Kingston General Hospital. It was the opinion of both these experts that Mr. Bolton could do the job of coil tester. Their opinions were based on a site visit to Cancoil, special testing of Mr. Bolton and the job description of coil tester provided by Cancoil.

The summary of the job description as found at the end of the expert report and in the job analysis matches the evidence that was put in by the Respondents' witness, Mr. Parkinson, and by the Complainant. The job was described in the Report's summary as follows:

> The essential duties of the job consisted of moving coils of various sizes by a mechanized hoist and moving device or by hand to the test tank for leak testing. The employee would be expected to do light lifting and occasionally medium lifting. Heavy lifting was done by a mechanized device. Occasionally the employee would be expected to lift and carry the covers for large coils, which was awkward as opposed to heavy, and required a wide grip. There was a requirement for fine finger dexterity in the use of the vice grips to secure

the copper wiring from the leak tank to the refrigerator coil. Walking, standing, are ongoing demands of the job as are handling, peeling and various facets of vision.

In her functional abilities evaluation/physical capacities assessment Ms. Stewart concluded that despite his birth deformity of the left hand, Mr. Bolton had adapted and used the hand in various ways, primarily as a supportive device in bi-manual work. The results of the Mesa-Tool Use Test was a four rating, which indicates infrequent problems or limitations, and potential acceptability in competitive employment. The comments under this rating were that Mr. Bolton had good cylindrical grasp, though not full good ball grasp. In the physical demand test, which measures strength and endurance, Mr. Bolton showed that he had excellent ability in lifting ten and twenty pound objects and that he was well above average in lifting fifty, one hundred, and one hundred and sixteen pound objects. Ms. Stewart stated that the shorter length of the left arm did affect how Mr. Bolton performed a task. She stated further that Mr. Bolton had adapted extremely effectively, using methods that were quick, effective and safe.

It was Ms. Stewart's conclusion that given the job description and what she observed at Cancoil, Mr. Bolton would have no difficulty in performing the job of coil tester. It was also her opinion that Mr. Bolton would be able to perform many other jobs in the plant, except those designated to be for skilled machinists. Ms. Vellone concurred with Ms. Stewart.

At the hearing Mr. Bolton lifted a small coil with no

difficulty and demonstrated the procedure of testing using the coil.

The Respondents challenged the experts' opinion that Mr. Bolton could do the job, mainly on the grounds that the experts did not understand the manufacturing processes of Cancoil or the essentials of the job. Mr. Datta gave evidence that the two experts spent a minimal amount of time viewing the plant. They were there for approximately one hour. These and several other attempts to undermine the credibility of the experts were not convincing. Although neither Ms. Vellone or Ms. Stewart are experts in coil manufacture, they are experts in assessing individuals for their abilities and capacities as compared to a particular job's requirements. The Respondents offered no independent expert evidence which contradicts the reports of the experts that Mr. Bolton could have done the job had he been given an opportunity.

As noted earlier, once the Commission proved that the Complainant had been denied the opportunity of employment because of a disability a *prima facie* case is established. The onus then shifts to the Respondents to prove on a preponderance of the evidence that the Complainant could not do the job. The Respondents only evidence to show that Mr. Bolton was not capable of doing this job was the opinions of Mr. Datta and Mr. Parkinson that he could not do the job safely.

Mr. Parkinson, an employee of Cancoil, on observing Mr. Bolton on his first day of work stated that he had safety

concerns and reservations about whether Mr. Bolton could do the job unaided. He raised these concerns with Mr. Datta, whereupon Mr. Datta approached Mr. Bolton and stopped him from working. Mr. Datta by his own evidence stopped Mr. Bolton immediately. He did not observe whether Mr. Bolton was doing the job properly or not. Mr. Parkinson gave evidence that he was of the opinion that the only job Mr. Bolton could do safely at Cancoil was that of janitor. Mr. Datta argued in closing that he was of the opinion that it was not even safe to let Mr. Bolton be assessed while doing the job.

There is no evidence before this Board to indicate that there was any intention on the part of Cancoil or Mr. Datta to discriminate against Mr. Bolton. There was no malice in their actions. Instead I am convinced that the Respondents were genuinely concerned about safety issues. However, neither intention nor malice are necessary to prove that there has been a violation of the Code. In the leading case in this area, applying this principle, Cindy Cameron v. the Nel-Gor Castle Nursing Home, [1984] 5 C.H.R.R. D/2170, the Board stated:

> An arbitrary assumption by an employer regarding a handicapped complainant's ability is not a defense even when such an assumption is held without any improper motive. {p 2192, para. 18497}

Thus, while I am convinced that the Respondents here were not motivated by any malice, and in fact were concerned about safety they assumed Mr. Bolton could not do the job. They did nothing to discover if their assumption was correct, which they are

required by law to do.

A recent case illustrates this point and is very similar to the one before me. Allen V. Singh (Board of Inquiry, 1993, unreported), the Complainant was hired as a medical secretary and after several days of employment there was an incident where her eyes glassed over and she acted peculiarly. When questioned by her employer Dr. Singh, about the incident, Ms. Allen mentioned that she had in the past had a prescription for Dilantin. Dr. Singh assumed that she had had an epileptic seizure, and his conclusion was that he did not want her working for him: he wanted someone "more competent".

The importance of this case is the Board's analysis of Dr. Singh's ability to raise a section 17 defense in the circumstances. As in the case before me, Dr. Singh had no intention of discriminating against Ms. Allen. His concerns were for how she would manage emergency situations, and whether she would be capable of performing the job as receptionist and secretary. The Board in Allen stated:

> Hence it is no defense for Dr. Singh to assert that he formed and honest opinion based on reasonable grounds. To avail himself of the defense he must establish both that Theresa Allen was incapable of performing the job and that he had taken all reasonable steps to establish the correct medical situation of Theresa Allen. (at p. 10)(emphasis added)

As in the Allen case, where her employer took no steps to do a full assessment of Ms. Allen's capabilities, Mr. Datta and Cancoil took no steps to assess whether or not Mr. Bolton could really do the job. The Respondents have not provided me with any

evidence that Mr. Bolton could not do the job of coil tester. The Respondents' opinion that it would not be safe for Mr. Bolton is insufficient to prove he could not do the job.

Since there were no steps taken to assess what Mr. Bolton could or could not do, there was certainly no analysis of what accommodation may have been helpful in order to assist Mr. Bolton in doing the job, if accommodation was deemed necessary. The duty to accommodate is clearly established in the Code and the case law on accommodation explains that the duty is to accommodate short of undue hardship.[2]

Several theories were advanced at the hearing for why Mr. Bolton could not work at Cancoil, including the position that all workers must be able to do all jobs, and that gloves were necessary for the job of coil tester. There was clearly an assumption by the Respondents that Mr. Bolton could not wear gloves and could not do all the jobs. If indeed these were problems for Mr. Bolton these are the sort of issues which may well have been part of an accommodation to permit Mr. Bolton to work at Cancoil. These issues do not prove that Mr. Bolton could not do the essentials of the job of coil tester.

It was Mr. Datta's evidence that he as owner and manager of the company was very concerned about having a handicapped person work for him because of the potential impact on Workers' Compensation Claims. Mr. Datta thought that because of Mr. Bolton's handicap, he was more likely to have a claim himself or

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[2] Ghosh v. Domglass (1992) 17 C.H.R.R. D/216

cause another worker in the plant to have a claim. The Respondents provided no evidence to support this opinion, and therefore I need not consider whether the argument should succeed.[3]

Mr. Datta also was most concerned about the provisions of the Occupational Health and Safety Act. Cancoil, Mr. Datta, and Mr. Parkinson were previously convicted of a violation under this Act and were concerned that if they hired someone with a handicap they would be found in violation of the Act. However nowhere in the Act does it state that hiring a person with a disability will violate this legislation. As much as this may have been a real concern for Mr. Datta, it is as Commission Counsel suggests, not an adequate defense.

The issue of whether or not Mr. Bolton could do the job and do so safely was something that was not adequately assessed by the employer. Had the employer sought the expertise of a vocational assessment counsellor such as Ms. Vellone or Ms. Stewart and discovered that indeed Mr. Bolton could not do the job safely and then proceeded to allow him to do the job, then perhaps the employer would have put itself at risk of violating the Occupation Health and Safety Act.

Health and safety reasons can support a Section 17 defense where there is evidence to prove a real problem. Here there is

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[3] See Weins v. Inco (1988) C.H.R.R. D/4795, an Ontario Board of Inquiry decision that rejected the argument that the potential increase of Workers' Compensation claims was an undue hardship on an employer.

no evidence to prove this. Commission Counsel pointed out that the Code does not require an employer to wait for an accident to occur before questioning a safety issue that may be raised because a person has a particular handicap. And an employer is not required to do special testing if it is obvious that there would be a health and safety risk. For example a blind person cannot drive a bus. However it is incumbent on employers not to assume that the handicapped employee cannot do the job. In most cases an employer will have to seek independent expert opinions as to whether a handicapped employee can do a job or not, and as to what accommodation might be necessary.

Having reviewed all the evidence submitted to me and the case law regarding discrimination on the basis of handicap in employment, I find that Cancoil and Mr. Datta violated Mr. Bolton's right to equal treatment in employment and therefore breached Sections 5(1) and 9 of the Code. Nor have the Respondents provided evidence to support a Section 17 defense. Thus the Complainant is entitled to win this case even without taking into account the evidence submitted through himself and the experts that he was quite capable of doing the job. The evidence provided by the experts that Mr. Bolton could do the job supports the finding that his rights were violated when the employer assumed without testing or assessing him that he could not.

Mr. Bolton had a job with a pizza restaurant which he gave up in order to take the job at Cancoil. After losing his job on

September 21, 1988, he went back to his previous employer and asked to start back at the old job. He was able to start back on October 14, 1988, missing 19 days of employment. There was no evidence given by the Respondents that this was an inadequate attempt to mitigate his loss of income. The Complainant is asking for $957.60 for his lost employment income. This is based on a $6.30 an hour wage at Cancoil and an 8 hour work day for 19 days.

The Complainant has asked for $4,000.00 as an award of general damages for compensation for his loss arising out of the breach of the Code. Traditionally Boards have reviewed the effect of the breach on the Complainant. In this case the evidence was that Mr. Bolton is an energetic, industrious man who has not let his disability hold him back. His own evidence was that in seeking a job with Cancoil he wished to advance his working career. When Mr. Datta told him on September 21, 1994 that he was of the opinion that Mr. Bolton could not do the job or any other job at Cancoil, the Complainant was hurt and upset. This evidence was corroborated by the Respondents in a note written by Mr. Datta added to Mr. Bolton's application form on September 21, 1988.

Mr. Bolton testified at the hearing that he was still upset by Cancoil's decision not to let him do the job. Mr. Bolton's wife, Dina Petropoulos gave evidence that after hearing the news on September 21, 1988, her husband was extremely upset. According to her evidence he was very disturbed about the incident for

several months. In the circumstances an award of $4000.00 for general damages is warranted.

Commission Counsel asked for interest on the award at the rate set by the Courts of Justice Act, which over the period averages approximately 10%. Although Boards of Inquiry are not bound by the Courts of Justice Act an award of interest is appropriate in this case.

Finally, Commission Counsel requested that I make an order pursuant to section 41(b) of the Code requiring that Cancoil's management attend a workplace seminar on Human Rights, as they pertain to persons with disabilities and their employment. Commission Counsel requested that my order require that Cancoil consult with the local Human Rights Commission Office. In oral argument Mr. Datta stated, without admitting any wrongdoing, Cancoil welcomed Commission Counsel's offer to hold an in-plant education session. He felt it would be useful. Given the evidence in this case an order for education would be appropriate.

Order

For the reasons noted above I find that Cancoil and Mr. Datta breached sections 5(1) and 9 of the Code, thereby violating Mr. Bolton's rights to be free from discrimination and hence make the following orders:

1. that Cancoil and Mr. Datta, being jointly and severally

liable, pay Mr. Bolton $4,957.60 in special and general damages, with interest from October 1, 1988 to April 13, 1993, the date of the conference call, at 10% per annum;

2. that if the payment of damages is not made within 60 days of the date of this order then interest shall begin to accrue at the Courts of Justice Act rate for post-judgment interest;

3. that Cancoil and Mr. Datta in conjunction with the Human Rights Commission provide an in-house seminar to all the Management of Cancoil on Human Rights as they pertain to handicapped workers.

Dated at Kingston, this 8th day of June, 1994.

D.J.D. Leighton
Board of Inquiry